Supreme Court of the United States.

OCTOBER TERM, 1903.

M. H. COURTNEY, *Appellant*,
v.
LOUIS A. PRADT, Executor of MERRIT B. ATWATER, deceased, and WM. C. ATWATER.
No. 371.

Motion of Appellees to Advance and Dismiss the Appeal and Brief Thereon.

Motion to Advance and Dismiss.

Now come the appellees, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and Wm. C. Atwater, and move the honorable Court to advance this case under Rule 32 of the Court and to dismiss the appeal herein, being an appeal from a decree of the U. S. Circuit Court for the Western District of Kentucky, because the Court has no jurisdiction of the same:

First. Because the appeal herein does not involve the jurisdiction of said Circuit Court as a Federal tribunal, as contemplated by the Judiciary Act of March 3d, 1891, section 5.

Second. Because the decree of said Circuit Court, appealed from dismissing appellant's case, was not based on a denial of the jurisdiction of that Court as a Federal Court, but, in the exercise of that jurisdiction; and the case was dismissed for the reason that a suit can not be

maintained in the courts of Kentucky against a foreign executor.

Third. Because the power of the Circuit Court, as a Federal Court, to hear and finally determine all questions and issues involved in this case has not, in any way, been denied, controverted or put in issue.

Fourth. Because no question of jurisdiction has been certified by the Circuit Court to this Court for decision, as required by the said Judiciary Act of March 3d, 1891, section 5; and no application was made to said Circuit Court for such certificate.

Fifth. Because no ground of jurisdiction of this Court upon this appeal is shown in the record herein.

The foregoing motion is based upon the following facts:

On the 25th day of September, 1901, appellant, M. H. Courtney, filed a petition in equity in the Powell Circuit Court, Kentucky, against the above-named appellees. By said petition he stated, in substance, that, in 1890 and prior thereto, Merrit B. and Wm. C. Atwater were partners under the firm name of M. B. Atwater & Company; that plaintiff, prior to the 10th of December, 1890, had rendered valuable services for said partnership, and there was a difference between plaintiff and said partners as to the amount plaintiff was entitled to receive for said services; that said partners, in order to adjust the said difference, proposed, by letter of December 10, 1890, to give to plaintiff, in satisfaction of his claim, stock in the Atwater and Fair Lumber Company, a Wisconsin corporation, of the face value of $5,000, with a guarantee that it was worth $8,000, and that said firm would, at the end of that season's cut, pay plaintiff $8,000 in cash therefor; that plaintiff accepted said proposition, by letter, and, at the end of the season's cut, demanded of said partners

a fulfilment of their offer; but his demand was not complied with, and that said partners wholly failed and refused to transfer to plaintiff said stock or pay him said sum of $8,000, or any part therof; that in the year 1898, the said Merrit B. Atwater, then a citizen of Wisconsin, died testate, and appointed the said Louis A. Pradt his executor; that said will was duly probated by the County Court of Marathon County, in the State of Wisconsin, and that said Louis A. Pradt had duly qualified as such executor and is now acting as such. The petition further stated that said Merrit B. Atwater, by his will, devised to his daughter, Charlotte R. Pradt, his residence in the City of Wausau, Wis.; to Sarah Downs, $1,000; to defendant Wm. C. Atwater, all of his right, title and interest in and to The Seamless Structural Company, of Milwaukee, Wis.; and the residue of his estate—real, personal and mixed—to his wife, Charlotte Atwater, for and during her natural life, and, after her death, he bequeathed and devised to said Wm. C. Atwater an undivided one-sixth interest in said residue. The petition further stated:

> "That the Atwater and Allen Land & Lumber Company (a different corporation from the Atwater and Fair Lumber Company, above mentioned, also a Wisconsin corporation) is a corporation duly created by and organized under the laws of the State of Wisconsin, with power to buy, sell, own and hold real estate in the State of Kentucky, and that prior to August, 1901, said corporation did buy and own real estate in the State of Kentucky, and practically all of its assets consisted of real estate in the said State of Kentucky. Plaintiff states that, during the month of August, 1901, said corporation sold its said real estate and realized a large sum of money therefor, and that practically the only business ever done by said corporation was to buy, own, hold and sell said real estate in the State of Kentucky.
>
> "Plaintiff states that Merrit B. Atwater, at the

time of his death, owned stock in said corporation, and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell County, Kentucky, and that said corporation has an agent resident there, upon whom a summons can be served." (Printed Record, page 3.)

The allegation, just quoted, was made for the purpose of procuring and was followed by an attempt to state grounds for a general order of attachment against the property belonging to the estate of Merritt B. Atwater located in Kentucky, and, a further statement followed, that plaintiff knew of no other creditors of the said Merritt B. Atwater, deceased, and that the assets of the estate of the said Merritt B. Atwater, in Wisconsin, exclusive of the stock held by him in the Atwater and Allen Land & Lumber Company was more than sufficient, in value, to pay all of the debts of said estate owing to creditors outside of the State of Kentucky.

Appended to said petition was the following prayer:

"Wherefore, plaintiff prays for judgment against the defendant, Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater, and each of them, for the sum of $8,000, with interest thereon at the rate of six per cent. per annum, from the 1st day of November, 1891, until paid, and for his costs herein, and prays for a general attachment against the property of said defendants, including debts owing to them, or either of them, and any choses in action, stocks, legal or equitable interests they may have in stocks or other property, and, that the same, when attached, may be subjected and applied to the satisfaction of plaintiff's claim herein, and further prays for all (general), equitable and proper relief." (Pages 1 to 4.)

At the filing of said petition, a general order of attachment was procured and directed to and placed in the hands of the sheriff of Powell County to execute. The only execution thereof the sheriff attempted to make was to summon the Atwater and Allen Land & Lumber Company (said last above-named Wisconsin Corporation), to answer as a garnishee, by

> "Delivering to Edward Rhubusky, the duly appointed agent of said Atwater and Allen Land & Lumber Company, a copy of the within attachment and summoning said Atwater and Allen Land & Lumber Company to answer as garnishee this September 25th, 1901." (Page 7).

Edward Rhubusky, named in the above return of the sheriff, had been designated by the Atwater and Allen Land & Lumber Company as its agent upon whom process could be executed, as required by Sec. 571, Ky. Stat., that Company having theretofore transacted business in the State of Kentucky. There was no claim that either of the defendants resided in or had any property in the State of Kentucky capable of manual delivery, nor that said Atwater and Allen Land & Lumber Company was, in any way, indebted to said William C. Atwater. Copy of said order of attachment, with the object of the action endorsed thereon, can be found on pages 6 and 7 of the Record; the said endorsement on the order was made in pursuance of Subsection 3 of Section 203 of Kentucky Civil Code, which fixes the manner in which a garnishee may be summoned,

> "by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or, as to a debt or demand, to the person owing it (d); or, as to stock in a corporation, or property held, or a debt or demand owing, by it, to the officer or agent upon whom a summons may be

served according to the provisions of Sec. 51, and by summoning the person or corporation to answer as a garnishee in the action."

On the 19th day of March, 1902, the said Atwater and Allen Land & Lumber Company filed in said State Court its answer as garnishee, which answer can be found on pages 7 and 8 of the Record, and is as follows:

"The Atwater and Allen Land & Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin, summoned herein as garnishee, says that said M. B. Atwater in his lifetime owned two hundred and fifty shares of the capital stock of said Company of the par value of $45.00 per share, and, owned said two hundred and fifty shares at the time of his death and that said shares now stand on the book of said Company in the name of said M. B. Atwater and now held by L. A. Pradt, who is the executor of the estate of the said M. B. Atwater.

"That, on the 30th day of August, A. D. 1901, a dividend was declared by the directors of said Company at a meeting held on that date.

"That the indebtedness of said Pradt, as executor of said M. B. Atwater, deceased, on account of said dividend, is $4,757.37, and that said amount is being held by the Atwater and Allen Land & Lumber Company, awaiting the decision of this Court.

"Said Atwater and Allen Land & Lumber Company does not owe anything to said W. C. Atwater, who is not a stockholder in said Company.

"That said W. C. Atwater has not been a stockholder in said Company since the year 1893 and was not a stockholder at the time of the declaration of said division on the 30th day of August, A. D. 1901."

After said answer was filed; to wit, on the 21st day of March, 1902, the said defendants filed in said State Court their petition for removal to the Circuit Court of the

United States for the Eastern District of Kentucky, which can be found on page 8 of the Record, and, is as follows:

"Your petitioners, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and Wm. C. Atwater, respectively show to this Honorable Court that they are the defendants in this suit, which is of a civil nature, and, that the matter and amount in dispute in this cause exceeds the sum and value of two thousand dollars ($2,000) exclusive of interest and costs, and that the controversy herein is wholly between citizens of different States; that the plaintiff, M. H. Courtney, was, at the time of the commencement of this suit, and still is, a citizen of the State of Kentucky, residing at Clay City, in said State, and, that your petitioner, Louis A. Pradt, executor of Merrit B. Atwater, deceased, was, at the time of the commencement of this suit, and still is, a citizen of the State of Wisconsin and of no other State, residing in the City of Wausau, in said State, and, your petitioner, Wm. C. Atwater, was, at the time of the commencement of this suit, and still is, a citizen of the State of Illinois and of no other State, residing in the City of Chicago, in said State, and, that your petitioners desire to move this cause, before the trial thereof, into the next Circuit Court of the United States to be held in the Eastern District of Kentucky, and, your petitioners offer herewith good and sufficient surety for their entering in the Circuit Court of the United States for the Eastern District of Kentucky, first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

"And your petitioners therefore pray that the said surety and bond may be accepted. That this suit may be removed to the next Circuit Court of the United States to be held in the Eastern District of Kentucky, pursuant to the statutes of the United States in such cases made and provided, and, that no further pro-

ceedings may be had herein in this Court—and, they will ever pray."

On the filing of said petition, the bond of petitioners, to be executed on the removal of a case, was presented, accepted and approved by the State Court and an order entered that the case be moved for trial to said Circuit Court. (Pages 10 and 11.)

After the record was copied and filed in said Circuit Court, to wit, on September 9, 1902, the following motion was entered in said Court:

> "The defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and Wm. C. Atwater, entering their appearance herein for the purpose of this motion only, move the Court to dismiss this cause for a want of jurisdiction to try same." (Page 13.)

At the same time the said Louis A. Pradt, executor, as aforesaid, filed special demurrer, setting forth as grounds therefor:

> "First. That the Court has no jurisdiction of the the person of this defendant.
>
> "Second. That the Court has no jurisdiction of the subject-matter of this action.
>
> "Third. That the complaint does not state facts sufficient to constitute a cause of action.
>
> "Fourth. That it appears upon the face of the said bill of complaint that this action was not commenced within the time limited by law, to wit, within the time limited by ———.
>
> "Fifth. That the plaintiff is not entitled upon said bill to the relief he prays for, because he has a plain and adequate remedy at law.
>
> "Sixth. That the plaintiff has not in and for his said bill stated such a case as entitled him in a court of equity to any discovery from this defendant, or, to any relief against him as to the matters contained in the said bill of complaint or any of such matters, and, that said bill doth not contain any matter of

equity whereon this Court can ground any decree or give the plaintiff any relief against this defendant." (Page 14.)

At the time the above motion was made and special demurrer filed, the plaintiff moved the Court to remand the case to the State Court, but stated no grounds therefor; his motion is as follows:

"The plaintiff, M. H. Courtney, moves the Court to remand this case to the State Court from whence it removed.

"BRECKINRIDGE & SHELBY &
"W. B. DIXON, *Attorneys for Plaintiff.*" (Page 12.)

Both of said motions and demurrer were submitted. (Page 13.) Afterward the Court filed two opinions thereon. (Pages 15 to 24.) The first of these opinions held that the motion to remand should be *overruled* (page 18), and, both of them held that the motion to dismiss should prevail. On page 15 of the Record the Court's statement of the case can be found; it is as follows:

"This is a suit by a creditor of a partnership, one of whose two members is dead, against his executor and the surviving partner, seeking to obtain payment of his debt. Both of the defendants are non-residents of this State and were so when the suit was brought. The decedent was likewise a non-resident at the time of his death and the defendant executor was appointed and qualified as such in the State of decedent's domicile; to wit, the State of Wisconsin. The suit was brought originally in the Powell Circuit Court and has been moved to this Court by the defendants on the ground of diversity of citizenship. Each defendant was brought before the State Court by constructive service of process and neither entered his appearance to the suit. An attachment was sued out and levied on stock owned by decedent in a Wisconsin corporation, doing business in this State,

and an indebtedness on the part of said corporation to him by serving the writ of attachment upon its agents in this State designated in accordance with the requirement of Sec. 571, Ky. Stat. It was not levied upon any property of the surviving partner, the other defendant. It is, therefore, a suit to subject the stock in and claim against said foreign corporation to the payment of said indebtedness by means of this attachment.

"The defendants move to dismiss the suit because its predecessor, the State court, acquired no jurisdiction by virtue of the proceedings had therein of the subject-matter of the suit or the persons of defendants.

"It is certain that the State Court had no jurisdiction so far as Wm. C. Atwater, the surviving partner, was concerned, unless it had jurisdiction of the suit as against the foreign executor of the deceased partner. It is not alleged that Wm. C. Atwater has any property in this State and the attachment has not been levied upon any property of his, save so far as he may be interested in the property levied on as the property of the deceased partner. The suit should be treated, therefore, as if it were a suit against the foreign executor alone.

"It is claimed by defendants that the State Court acquired no jurisdiction of the suit, so far as said defendant was concerned, upon two grounds. One is, that, by reason of the fact that the garnishee is a foreign corporation, the decedent's stock in and claim against it is not subject to attachment and subjection to payment of plaintiff's indebtedness against the partnership in the courts of the State. * * * The other ground is, that, because the claim garnisheed is a decedent's estate, it was not subject to attachment."

The Court, after making the foregoing statement of the case and some reference to questions submitted, says:

"There is one ground upon which it can be

claimed, without question, the State Court has no jurisdiction of the suit as against the defendant executor, and hence, not at all, and, that ground is that he is a foreign executor. The law in regard to foreign representatives of decedent's estate to sue and be sued in other jurisdictions, than those in which they were appointed, is thus stated by Mr. Justice Story in

Vaughn v. *Northrup*, 15 Pet. 1.

"It has become an established doctrine that an administrator, appointed in one State, can not, in his official capacity, sue for any debts due to his intestate in the courts of another State, and that he is not liable to be sued in that capacity in the courts of the latter by any creditor, for any debt due there by his intestate."

"This law has been recognized and applied in this Commonwealth. Because of it, it has been held that a foreign personal representative could not sue to recover a debt due the decedent without complying with the terms of Sec. 3878 and 3879. Ky. Stat."

Marrett v. *Babb*, 91 Ky. 88.

"And that a foreign personal representative could not sue at all in this State to recover an asset of the State which did not constitute a debt due the decedent.

Maysville St. R. R. & T. Co. v. *Marvin*, 59 Fed. Rep. 91;

L. & N. R. R. Co. v. *Brantley*, 96 Ky. 297.

"That a suit can not be brought in this State against a foreign personal representative is expressly decided in the case of

Smith v. *Baker*, 3 Met. 264.

"It is true this suit is against him to subject an asset claimed to have a situs in this State. But that can make no difference. The resident creditors of a non-resident have ample provisions made for subjecting assets having a situs in the State to the payment of their debts. They can obtain administration on the decedent's estate in this State and then those assets. And the foreign personal representative can

not sue at all for some, and, for those for which he can sue he is required to give bond that will protect local creditors. It is, therefore, not necessary, in order to protect them, that such a novel proceeding as a suit against the foreign personal representative should be upheld. I am not aware of any authority justifying such a proceeding.

"It seems to me, therefore, that the motion to dismiss the suit because of want of jurisdiction in the State Court to entertain the suit should be sustained. There is no doubt that, if such want of jurisdiction exists, this Court has the power to dismiss the suit. I am not bound to remand the case and let the State court determine the question. By reason of the diversity of citizenship and compliance with the removal status this Court has acquired the right to determine that question and to act accordingly." (Pages 16 and 17.)

In the second opinion, the Court, after stating the authorities, said:

"This being so, there is no room for holding that this suit is maintainable against the defendant executor. There is no statute in this State rendering a foreign executor or administrator suable therein. Sections 3878 and 3879, Ky. Stat., provide for his suing herein, upon taking certain steps. If he takes such steps he can not only sue therein, but is liable to be sued therein, even by a non-resident creditor, as was held in New York in the case of

Hopper v. *Hopper*, *supra*.

"Sections 3898, 3899 and 3900, Ky. Stat., provide for administration upon the assets of a non-resident decedent located in this State. By either procedure creditors of a non-resident decedent subject assets located in this State to the payment of their debts. This procedure is ample to secure them in their debts. But, whether so or not, there is none other. The Legislature of Kentucky has not seen fit to provide that suits may be brought against foreign execu-

tors or administrators and attachments obtained against the estates of their decedents located in this State, as has been done in the States of Kansas, Ohio, Alabama, Indiana, and perhaps in other States. In the absence of such a statute no such suit can be brought in this State. And, I think the case of

Smith v. *Baker*, 3 Met. 264,

cited in former opinion, is directly in point here. The facts of the case are merely stated in the opinion. But, it cites the extract from Story, quoted above, in support of the decision there made and the reasonable inference is that it was a suit against a foreign representative to subject assets in this State or to render him liable on account of assets therein. And, whether so or not, it expressly lays down the only condition upon which a foreign representative can be sued in this State and does not come within that requirement.

"Judge Duvall said:

"'An administrator or executor who is appointed, who qualifies in another State and there receives assets into his hands, may be sued in the tribunals in this State by the person or persons entitled to such assets *if he shall have removed to and settled in this State.* Such seems to be the well settled doctrine. But, the right to sue a foreign administrator has never been extended further.'

"If, then, it be conceded that the liability of the non-resident corporation doing business in this State to the decedent Atwater is an asset located in this State and that it is allowable for a creditor of decedent to sue out an attachment against his property in a suit against his personal representative, the latter of which two conditions, at least, I very seriously doubt, still, this suit can not be maintained because it is a suit against a foreign executor who has never collected said asset and has never qualified with Sections 3878 and 3879, Ky. Stat., so as to be authorized to sue for it and there is no statute in this State authorizing such a suit. I must, therefore, adhere to my former opinion." (Pages 23 and 24.)

Thereupon, a decree was entered overruling the plaintiff's motion to remand and sustaining defendant's motion to dismiss the case for want of jurisdiction, and, noting the fact that, on the entering of said decree, plaintiff had *filed a petition* for appeal and an assignment of errors, and, that his appeal was allowed, as prayed for, which decree is as follows:

> "This cause having been heard and submitted on the plaintiff's motion to remand this case to the State Court, and, on the defendant's demurrer to the jurisdiction of this Court, and, the motion of defendants to dismiss this case for want of jurisdiction in this Court, and, the Court being fully advised, it is ordered that plaintiff's motion to remand this case to the State Court be and it is hereby overruled, to which plaintiff excepts.
>
> "It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this Court and motion to dismiss this suit for want of jurisdiction in this Court, be and the same are hereby sustained, and, that this suit be and the same is hereby dismissed, for want of jurisdiction in this Court. And, thereupon came plaintiff in open court and filed his petition for an appeal and assignment of errors, and, prayed an appeal to the Supreme Court of the United States from his final decree in dismissing said suit for want of jurisdiction in this Court, which appeal is hereby allowed upon the execution of a bond in penalty of $500 by plaintiff M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and, answer all damages and costs, if he fail to make his plea good, which bond shall operate as a supersedeas." (Page 25.)

His assignment of errors is as follows:

"I.

"The Court erred in overruling and in not sustaining plaintiff's motion to remand this cause to the State court.

"II.

"The Court erred in sustaining and in not overruling defendant's demurrer in the jurisdiction of this court.

"III.

"The Court erred in sustaining and in not overruling the defendant's motion to dismiss this suit for want of jurisdiction in this Court.

"IV.

"The Court erred in dismissing this suit for want of jurisdiction in this Court.

"Wherefore, the petitioner says that the said final decree, order and judgment aforesaid is erroneous, and, prays this Honorable Court to grant him an appeal to the Supreme Court of the United States to the end, that said decree may be reversed and that said errors may be corrected, and so he will ever pray." (Page 26.)

No question as to the jurisdiction of the Circuit Court was certified to this court by the Circuit Court for decision, and, no application was made to the Circuit Court for such certificate.

The appellant has had the entire record printed.

EDWIN C. BRANDENBURG,
Attorney for Appellees.

Brief of Appellees on Motion to Dismiss This Appeal for Want of Jurisdiction to Entertain the Same.

This is an appeal from the decree of the United States Circuit Court for the eastern district of Kentucky, dismissing the action. The appeal is taken by the complainant. The defendants and appellees have made a motion to dismiss this appeal. The statement of facts in the motion papers gives every step taken in the case, from the time of its commencement up to the time it was dismissed, together with the assignment of errors and the allowance of the appeal. From this it will be seen that the suit was originally commenced in the Powell County Circuit Court in the State of Kentucky. The plaintiff at the time of commencement of the suit was and still is a resident and citizen of Kentucky. The defendants were then and are now non-residents and citizens of other States. The amount in controversy exceeds $2,000.

Defendants and appellees filed a petition in the State court for a removal of the case to the United States Circuit Court for the eastern district of Kentucky, the motion being based solely on the ground of diverse citizenship. The cause was accordingly removed to the United States Circuit Court. After such removal, plaintiff and appellant filed a motion to remand the cause to the State court without any specific allegations or grounds for such removal. This motion was overruled. The defendants and appellees then filed in the United States Circuit Court a special demurrer to the jurisdiction of the court, and also entered a motion to dismiss the action because of such lack of jurisdiction. The grounds of the motion were that the defendant, being a non-resident executor appointed by a court of general probate jurisdiction in Wisconsin, could not be sued in Kentucky.

The demurrer was sustained and also the defendant's motion to dismiss, and the action was accordingly dismissed. Such dismissal was not made because of lack of jurisdiction in the United States Circuit Court as a federal court to hear and determine all issues of law and fact, involved in the action; it was dismissed in the actual exercise of such jurisdiction. The appellant has had the entire record printed. The decree dismissing the case is on page 25 of Record. This decree fails to state the reason of the court for holding that it had no jurisdiction to try the action, but the reasons for such dismissal are plainly stated in each of two opinions filed by the Court. (Pages 15 to 24 of Record.)

In its first opinion (see page 16 of printed transcript) the court said:

> "There is one ground upon which it can be claimed without question, the State Court has no jurisdiction of the suit as against the defendant executor and hence not at all, and that ground is that he is a foreign executor."

In the second opinion (see printed transcript of Record, page 23) the Court said:

> "This being so, there is no room for holding that this suit is maintainable against the defendant executor. There is no statute in this State rendering a foreign executor or administrator suable therein. § 3878 and § 3879 Ky. Stat. provide for his suing herein upon taking certain steps; if he takes such steps he can not only sue therein, but is liable to be sued therein even by a non-resident creditor, as was held in the N. Y. case of *Hopper* v. *Hopper*, *supra*." (125 N. Y. 400.)

Again the Court says (page 24, printed transcript):

> "Still this suit can not be maintained, because it is a suit against a foreign executor, who has never col-

lected said asset and has never complied with § 3878 and § 3879 Ky. Stat., so as to be authorized to sue for it, and there is no statute in this State authorizing a suit."

It is clear therefore that this action was dismissed for the sole reason that the defendant executor was under the laws of Kentucky not liable to suit in that State.

In order to determine the ground for the decision of the lower court its opinion may be examined.

Loeb v. *Trustees of Columbia Township*, 179 U. S. 472;
Sayward v. *Denny*, 158 U. S. 180;
Murdock v. *Memphis*, 20 Wall. 590;
Cross v. *U. S. M. Co.* 108 U. S. 477.

Some of these decisions were made in appeals from State Courts but the rule adopted is applied to all appeals. Sec. 5 of the Act of March 3, 1891, provides that appeals or writs of error may be taken from the U. S. District or Circuit Courts direct to the Supreme Court in cases in which the jurisdiction of the court is in issue, and in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. It must be conceded that this Act of 1891 provides for no direct appeal in this case, except upon the question of jurisdiction.

The U. S. Circuit Court for the Eastern District of Kentucky did not certify to this Court the question of jurisdiction as required by the Judiciary Act cited, and no application was made to said Circuit Court for such certificate.

The grounds of this motion as set forth in the motion are—

"First. Because the appeal herein does not involve the jurisdiction of said Circuit Court as a Federal tribunal, as contemplated by the Judiciary Act of March 3, 1891, section 5.

"Second. Because the decree of said Circuit Court

appealed from, dismissing appellant's case, was not based on a denial of the jurisdiction of that Court as a Federal court, but in the exercise of that jurisdiction; and the case was dismissed for the reason that a suit can not be maintained in the courts of Kentucky against a foreign executor.

"Third. Because the power of the Circuit Court, as a Federal court, to hear and finally determine all questions and issues involved in this case has not, in any way, been denied, controverted or put in issue.

"Fourth. Because no question of jurisdiction has been certified by the Circuit Court to this Court for decision, as required by the said Judiciary Act of March 3d, 1891, section 5; and no application was made to said Circuit Court for such certificate."

This is not a case in which the jurisdiction of the Court is in issue as prescribed by such Judiciary Act. See 26 Stat. L. 826; U. S. Comp. Stat. 549.

In *Maynard* v. *Hecht*, 151 U. S. 324, it was held that such certificate as to the jurisdictional question must be presented in order to give this Court jurisdiction.

In *Huntington* v. *Laidley*, 176 U. S. 668, this Court stated the rule as follows:

"In order to maintain the appellate jurisdiction of this Court under this clause the record must distinctly and unequivocally show that the Court below sends up for consideration the single and distinct question of jurisdiction.

"This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal or by separate certificate of the Court below."

In *Arkansas* v. *Schlurholz*, 179 U. S. 598, this question was again considered and the doctrine of *Maynard* v. *Hecht*, *supra*, approved. This last cited case holds that the question of jurisdiction can not be ascertained from the

assignment of errors made by appellant. But the absence of this certificate as to a jurisdictional question may not be important in this case, although upon this ground alone the Court might be justified in dismissing the appeal. Independent of this question, however, it appears from the record, including the opinions of the lower Court, that the jurisdiction of the Circuit Court as a Federal court was in no wise involved in the case.

This question of jurisdiction is one which the Court will answer for itself whether propounded by counsel or not.

> *Defiance Water Company* v. *Defiance*, 191 U.S. 184;
> *Anglo-American Provision Co.* v. *Davis Provision Co.* 191 U. S. 376.

In *Smith* v. *McKay*, 161 U. S. 355, the question was whether the plaintiff had a complete remedy at law and the Circuit Court had jurisdiction of the parties by reason of diverse citizenship and of the subject-matter. It was held not to be a question of jurisdiction which could be certified to the Supreme Court under the Judiciary Act of March 3, 1891, section 5, the objection being not to the want of power but to the want of equity. In this last case the Court impliedly at least sustained the proposition that it was only questions of Federal jurisdiction which could be brought directly to this Court on appeal from the Circuit or District courts.

In *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170, this view is sustained.

In *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, on appeal from the Circuit Court for the western district of Kentucky, the appeal was dismissed for want of jurisdiction.

The question there was whether the Federal circuit court under the principle of equity and comity governing all courts of concurrent jurisdiction over the same

subject-matter has authority to administer a trust estate, after a suit with reference thereto has been begun in the State court. It was held that the case did not involve the jurisdiction of the circuit court as a Federal court and therefore no direct appeal would lie. The Court in this last case said:

> "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a Federal court and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

And in *Blythe* v. *Hinckley*, 173 U. S. 501, the court said:

> "Appeals or writs of error may be taken directly from the circuit court to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts. The question alone of jurisdiction being certified to this court. * * * If we were to take jurisdiction on this certificate we could only determine whether the circuit court had jurisdiction as a court of the United States, and as the decree rested on no denial on its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal can not be maintained in that aspect."

Nor can the force of these authorities be diminished by the *dictum* of the Court in cases where this question was not raised. Upon this question the Court, in *Louisville Trust Co.* v. *Knott*, quotes Chief Justice Marshall in U. S. *v.* Moore, 3 Cranch. 159, as follows:

> "No question was made in that case as to the jurisdiction. It passed *sub silentio* and the Court does not consider itself as bound by that case.

In the case of *Louisville Trust Co.* v. *Knott*, this Court announces its final and decisive views upon this question, and as sustaining this view by strong implication we cite the case of *Cummings* v. *Chicago*, 188 U. S. 410, holding that where the jurisdiction of the Federal court, as a Federal court is involved, a direct appeal will lie.

The same may be said of *Davis & Farnum Co.* v. *Los Angeles*, 189 U. S. 207.

The Court in that case said that as the bill was based upon diversity of citizenship and also upon the alleged unconstitutionality of certain municipal ordinances under the Federal constitution, a direct appeal would lie. So, also, it was held that a suit to establish a land claim by virtue of a treaty could be properly brought by direct appeal from the Circuit Court to the Supreme Court of the U. S.

Mitchell v. *Furman*, 180 U. S. 402.

Respectfully submitted.

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